

House Bill 433
February 14, 2011
Presented by Bill Schenk
House Natural Resources Committee

Mr. Chairman and committee members, I am Bill Schenk, Legal Counsel for the Montana Department of Fish, Wildlife & Parks (FWP). I am here in opposition to House Bill 433.

HB433 would amend the Montana Water Use Act to expand the exemption to permitting requirements for new uses of groundwater. Currently, the Act states that a permit is not required before appropriating ground water by means of a well or developed spring with a maximum flow rate of 35 gallons a minute and a maximum volume of 10-acre-feet per year, except that use of the exemption is supposedly limited in that a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit. HB433 would simply eliminate the phrase "from the same source from two or more wells or developed springs", and would define the term "combined appropriation" as "an appropriation of water from the same source aquifer by two or more wells or developed springs for the same beneficial use that are physically connected through a distribution system. Thus, to be considered a combine appropriation, and therefore be subject to the permitting process, the development would have to be

- two or more wells,
- physically connected in the same distribution system AND
- for the same use.

The Water Use Act has always contained an exemption. When the Act was passed, it provided that permits were not required before appropriating ground water for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred gallons per minute. Over time, the Legislature decreased the allowed flow rate to 35 gallons per minute for exempt wells and capped the volume at 10 acre feet. The phrase, "combined appropriation from the same source" was added to this statutory language at Department of Natural Resources and Conservation's (DNRC) request in 1987. That same year, DNRC developed a rule defining combined appropriations as "... an appropriation of water from the same source aquifer by two or more ground water developments, the purpose of which, in the department's judgment could have been accomplished by a single appropriation." DNRC amended the administrative rule definition of combine appropriation in 1993 resulting in a dramatic change in its meaning. Under the current rule, a combined appropriation means "an appropriation of water from the same source aquifer by two or more ground water developments, that are physically manifold into the same system." 36.12.101 (13) ARM (1993). Therefore, a subdivision could use as many wells as there are lots, rather than a permitted central water supply system, as long as none of the wells were connected together.

In 2009 DNRC was petitioned to declare the current definition invalid and initiate rulemaking to modify this rule. In August 2010 the agency ruling retained the existing rule as consistent with the statute, but also said it would initiate rulemaking to repeal the definition and, presumably,

find a new definition that considered input from the public. This legislation would short circuit the rulemaking process.

FWP agrees with the policy of exempting certain small ground water developments from the full water use act review but asserts that those exemptions must not be defined in such a manner that contradicts the intent of the act and the constitutional protections for existing water rights due to the lack of **public notice** and the **ability of potentially affected parties to participate** in the permitting decision. We believe that Montana's instream flows and both the fisheries and recreationists that depend on them are harmed by the cumulative effect of multiple exempt wells, such as those used for subdivisions.

The bill would create an enormous disincentive for developers to install central water supply systems. Potential adverse affects to all existing water users, including senior irrigators, would not be accounted for much less mitigated. FWP favors allowing DNRC to complete its rulemaking, which could possibly result in a compromise and would avoid the likelihood of further litigation.